Nos. 12,698 and 12,699

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF CHINA (a corporation), *Appellant,* vs. WELLS FARGO BANK & UNION TRUST Co. (a banking corporation), *Appellee.*	No. 12,698
BANK OF CHINA (a corporation), *Appellant,* vs. WELLS FARGO BANK & UNION TRUST Co. (a banking corporation), *Appellee.*	No. 12,699

MOVANT-APPELLEE'S BRIEF.

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MOVANT-APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

The statement of jurisdiction presented by appellant is controverted. Heretofore, the movant-appellee moved to dismiss these appeals upon the ground that this Court was without jurisdiction to review the order of the District Court. On October 17, 1950, this Court denied the motions "without prejudice to

their renewal upon the hearing of the causes on the merits." A detailed discussion of the jurisdictional question is contained in the brief herein (pp. 23-36).

STATEMENT OF THE CASE.

Appellant's statement of the case is also controverted. The appellant's brief disregards entirely the findings contained in the opinion of the District Court below (R. 96-106); it overlooks the testimony and exhibits contained in the record which militate against its position, some of which were presented by the appellant itself (R. 155-176, 181-184, 186-197, 232-244, 264-266, 274-284, 286-292); it disregards the limited nature of the issue before the District Court and the real parties involved in controversy therein; and it characterizes unfairly, it is respectfully submitted, the action taken by the District Court (App. Br. p. 10).

The attempt of the appellant to "rush" this case to judgment (App. Br. pp. 26-28), sharply rejected by the District Court below (R. 375), lends support to the view that appellant is unwilling to recognize any power in the courts to exercise their judicial functions and apply the law as justice in the particular case may require. It is submitted that a court of law, as the District Court held, consistent with its constitutional commission, must function in a manner separate and different from that of another department of government; that courts cannot simply become instruments of executive policy as the appel-

lant would appear to urge; and that, consistent with grants of authority contained in the Constitution and statutes, courts of law must consider the private rights and obligations of individuals wherever issues are appropriately presented for decision. The appellant's brief injects totally irrelevant and misleading issues and uses volatile nomenclature which it readily admitted in the court below, when pressed, "has nothing to do with it, and I make no pretense it has." (R. 356.) This makes necessary, therefore, a separate statement of the case by the movant-appellee.

THE FACTS.

On November 9, 1949, there was instituted in the United States District Court for the Northern District of California, Southern Division, a suit on behalf of the Bank of China, an alien corporation, "citizen, resident and inhabitant of the Republic of China" (R. 3) against the Wells Fargo Bank & Union Trust Co., a banking corporation, organized under the laws of the State of California (R. 3-5). The suit was for a sum of money, $626,860.07, alleged to have been deposited with Wells Fargo, repayment of which had been allegedly demanded and refused.[1]

The answer of Wells Fargo (R. 5-10) was filed on December 5, 1949 (R. 10). It alleged, among

[1]A similar suit for an additional sum of $174,224.57 was instituted on April 26, 1950 (No. 12699, R. 3-5). No motion for summary judgment was made in this second suit. The issues are the same in both cases. Reference, unless otherwise indicated, will be solely to the record in No. 12698.

other things, that some time prior to October 11, 1949, an account was opened in the name of "Bank of China, Shanghai" (R. 7); that it had been furnished at that time and subsequently with facsimiles of signatures of persons authorized to draw on said account; that on June 27, 1949, and October 10, 1949, the defendant Wells Fargo received cabled instructions from Shanghai, China, signed "Bank of China, Shanghai, China," to the effect that former specimen signatures should be considered null and void and that no payments should be made from the account except upon orders received from Bank of China, Shanghai, China (R. 7-8).

The answer further alleged that on October 7, 1949, and thereafter, "certain individuals purporting to represent the Bank of China, residing in Hongkong and in New York City" (R. 9), made demand for payment of the sum of $626,860.07 in the name of the Bank of China; that Wells Fargo had been furnished with no written evidence from the Board of Directors of the Bank of China relative to the authority of those who purported to exercise dominion and control over the account (R. 9); and that in view of the conflicting claims, Wells Fargo was unable to ascertain to whom the funds might legally be paid (R. 9).

MOTION FOR SUMMARY JUDGMENT.

On December 9, 1949, the parties and their counsel who had instituted the suit moved for summary judgment (R. 11-12). For the first time, the purported

authority of those who had acted in behalf of the Bank of China was revealed.

The affidavit of H. H. Kung (R. 13-15), verified November 28, 1949, stated that "he is now sojourning in the City and State of New York" (R. 13); that for the past five years he had been a Managing Director of the Bank of China; that he was Minister of Finance of the National government of the Republic of China in March, 1936; that he had at that time executed his certificate as to the Articles of Association of the Bank of China; that the plaintiff in this action is the same Bank of China whose Articles of Association he certified in 1936; that "there has been no change or amendment in the said Articles of Association from March 2, 1936, to the date of this affidavit" (R. 14). Nothing was stated in the Kung affidavit (although he described himself as a "Managing Director") relative to the authority of those who made the demand on Wells Fargo or who instituted the action on behalf of Bank of China.

Another affidavit, verified March 30, 1950, was submitted by one Hsi Te-Mou (R. 34-36). Te-Mou averred that he had been General Manager and Managing Director of Bank of China since May 6, 1948; that the Bank was organized in 1912 and that the Articles of Association submitted by Kung were "true and correct"; that as General Manager "there has been under his control and supervision" the books, records and accounts of the corporation (R. 35); that the sum of $626,860.07 had been deposited with Wells Fargo, and said corporation "has heretofore demanded repayment of the said sum" (R. 35).

Te-Mou also affirmed that in December, 1946, the Board of Directors at a meeting in Shanghai, China, executed a power of attorney to one Tuh-Yueh Lee "to represent this corporation in the United States of America" (R. 35); that prior to April 29, 1949, the principal place of business of the Bank of China "was regularly and lawfully" removed from Shanghai, China, to Canton, China, and thereafter was removed to and "is now located at Chungking, China" (R. 36); that since the removal of the principal office from Shanghai, no agent or representative in said city was authorized to issue any order whatever affecting the Wells Fargo account; that no such order was or could have been issued by said Bank of China from any source in the City of Shanghai (R. 36). The Te-Mou affidavit was also devoid of any indication as to who had authorized the demand upon Wells Fargo or the institution of the suit.

The third affidavit was by Tuh-Yueh Lee, verified March 30, 1950 (R. 56-57). Lee described himself as "Manager of the New York Agency of the Bank of China," with offices located in New York. He affirmed that the power of attorney which had been executed in 1946 had never been revoked, and that "acting under the authority contained in said power of attorney," he had directed the action to be brought "by and in the name of said Bank of China" (R. 56-57). There was again no indication in Lee's affidavit as to who had been responsible for the original demand made upon Wells Fargo. It was also clear, so far as the institution of the suit was concerned, that Lee had acted solely on the basis of his 1946

power of attorney (R. 37-54). There was no evidence of any resolution or vote of the directors or shareholders of the Bank either with respect to making a demand upon Wells Fargo or the institution of any suits on its behalf.

The affidavits of the Wells Fargo Bank, in opposition, included the sworn statement of W. J. Gilstrap, its Vice President. It was then affirmed that on June 27, 1949, Wells Fargo received a cable from Shanghai, China "in the said test key" and signed "Bank of China, Shanghai, China," advising Wells Fargo that with the liberation of Shanghai, the Bank of China was taken over by the Shanghai Military Control Commission and that "the powers vested in its original Board of Directors are now temporarily vested in the East China Financial and Economic Affairs Administration." Officers who escaped to Hongkong and elsewhere had been dismissed, and "all communications from them are unauthorized" (R. 67). On June 30, 1949, a second cable from Bank of China, Shanghai, China, advised Wells Fargo that "Bank of China, Foreign Department, Hongkong is illegal" and that Wells Fargo would be held responsible for all unauthorized payments (R. 68). On July 22, 1949, Wells Fargo was again advised from Shanghai that Kungyingping had been appointed General Manager of the Bank of China, Head Office, and Chichaoting, First Assistant General Manager and Manager of Foreign Department and all branch offices (R. 68). On October 11, 1949, Bank of China again cabled Wells Fargo that the Central Peoples Government of Peoples Republic of China had been

established October 1, that payments of Bank of China accounts on any order except Bank of China, Shanghai, China, were to be immediately suspended (R. 69).

The affidavit further stated that throughout the period covered by the aforesaid cablegrams, Wells Fargo was receiving telegrams and letters from persons purporting to represent "Bank of China, New York," "Bank of China, Hongkong," and "Bank of China, Canton," attempting to exercise control over the deposit; that the Articles of Association of the Bank of China provided for only one Head Office in Shanghai (R. 70); that no evidence of any meeting of shareholders or board of directors authorizing the removal of the Head Office had ever been received.

F. J. Hellman, another Vice President of Wells Fargo, affirmed that after receipt of the cable of June 27, 1949, from Bank of China, Shanghai, he had caused a cable to be sent to one R. C. Chen, suggesting transfer of the account to an account reading "Bank of China, Foreign Department, Hongkong," but that he had made the suggestion without consulting legal counsel, the Articles or by-laws of the Bank of China, and without regard to the legal effect of the cable received on June 27, 1949 (R. 75).

On December 19, 1949, the motion for summary judgment came on for argument before the Honorable Louis E. Goodman, a Judge of the United States District Court (R. 327-336). Counsel for appellant stated that "we are quite content to submit the question of authority on the basis of the affidavits before

your Honor here today" (R. 328). Counsel for Wells Fargo asserted that "* * * the Bank of China has only half of its shares, I understand, owned by the Government of China, the other half are in private hands. There are twenty-one directors of the Bank of China of which in addition to that seven managing directors of whom we have heard from two; Dr. Kung, at one time Minister of Finance, who has fled the country, and two or three others who are no longer in the country—and we dispute the fact that these people are in effect the Bank of China" (R. 330).

The Court reserved its ruling on the motion for summary judgment and the case was set for trial on December 29, 1949 (R. 335). Subsequently the trial was reset for February 1, 1950 (R. 99).

THE APPELLANT'S DEPOSITIONS.

The depositions taken by appellant of its own witnesses in preparation for trial, with only Wells Fargo appearing in opposition, are of great significance. The testimony of appellant's own witnesses demonstrated unequivocally that the Bank of China was a private corporation; that the demand made upon Wells Fargo for a deposit of close to three quarters of a million dollars was never authorized by the Bank of China; that similarly the institution of the present suit had never been authorized by the Bank of China; that the affidavits submitted in support of the motion for summary judgment were not in accordance with

the essential facts; that in truth, as the District Court found, the demand and suit had been initiated by some "emigre directors" who could no longer speak for the Bank of China, to which Bank "the funds here in controversy belong" (R. 102).

The deposition of H. H. Kung was taken on January 16, 1950 (R. 154-185). Kung testified that the Bank of China was a commercial bank (R. 155); no decree had ever terminated the existence of the Bank (R. 158). Dr. Kung had been in the United States since 1944, at which time he resigned as Minister of Finance (R. 160). Before 1935, the shares of the Bank were held entirely by private shareholders (R. 162); after 1935, the capital of the Bank was increased—"the government owned 200,000 shares and the public owned 200,000 shares" (R. 164).

> "Q. Do you know where those share are held or generally by whom?
>
> A. By five thousand different individuals." (R. 165.)

The witness testified further that the shareholders elect the board of directors, who in turn elect the managing directors, from whom the government appoints a chairman (R. 168). The government as shareholder elects nine directors and three supervisors; the remaining twelve directors and four supervisors are elected at a general meeting of shareholders (R. 168). Dr. Kung stated that there had been no meetings of the corporation for the election of directors and no meetings of the directors and no appointment of a chairman since March, 1948

(R. 170). "The shareholders were spread all over" (R. 170). The Articles of Association were never amended to change the Head Office of the Bank from Shanghai, China (R. 171). The funds on deposit with Wells Fargo were not government funds; they were funds belonging to the Bank of China (R. 173-174). Dr. Kung had not authorized the institution of the suit (R. 176). Of the Board of Directors which had last met in March, 1948 (R. 170), the chairman and seven others were in 1950 residing in Hongkong, six were in Formosa, six were in New York, one in California, one in Shanghai, China, one in Hangchow, China, and the residence of two others was listed as "unknown" (R. 183). Since the resignation of Dr. Kung as Minister of Finance in 1944, six other persons had served in the same capacity for varying periods of time (R. 182).

Hsi Te-Mou testified (R. 186-244) that in May, 1948 he was appointed general manager of the Bank (R. 187); that the Bank of China was organized in 1912 when China became a Republic (R. 187). The witness thought that the Board of Directors should meet in Formosa, "but I don't think they could get a quorum" (R. 236). He thought a meeting had perhaps taken place in Hongkong, "in August, maybe (1949)" (R. 237), but he didn't know the date and would consult a Mr. Yoo (R. 237). Dr. Kung was right in saying that the last shareholders' meeting was in March, 1948 (R. 237). While some "high officers" of the Bank had left Shanghai, some of the directors of the Bank, "assistant chiefs and so on" had remained (R. 239).

As to Mr. Lee's authority to institute a suit on behalf of the Bank of China pursuant to his 1946 power of attorney, the witness was positive that Lee had no authority to make a demand or institute any action without instructions (R. 242). While the witness had stated in his sworn affidavit that the books, records and accounts of the Bank of China were "under his control and supervision" (R. 35), he now stated that some of the books were in Formosa, "possibly some in Shanghai" (R. 243).

Y. Y. Lee testified (R. 245-266) that he was the manager of the New York agency of the Bank of China, to which position he had been transferred in 1946 (R. 245). He had directed the institution of the suit, having "talked" with Mr. Hsi and Dr. Kung before it was started (R. 263). They expressed their approval of the commencement of the litigation (R. 264). Lee stated that if he opens an account for the New York agency with some bank, then he can draw on it, but if the head office opens an account with another bank, he cannot draw on it unless he is instructed to do so (R. 266).

Hsi Te-Mou returned to testify (R. 268-292) and submitted a circular letter addressed to correspondent banks dated May 16, 1949, from the Bank of China, "head office at Canton," informing the recipients that "our Foreign Department has been transferred to Hongkong" (R. 270-272). Of the list of directors which he submitted, he stated it was possible that some of the people listed may have resigned (R. 281). He now stated that most of the corporate

books are in Shanghai (R. 283-284). He was certain that none of the funds deposited with Wells Fargo were public funds of the government deposited abroad (R. 284). "* * * the Bank of China is a commercial bank and its deposits with Wells Fargo are private deposits, so far as that is concerned" (R. 284). The witness also stated, after checking, that he was unable to state whether some of the Board of Directors had resigned or gone over to the People's Government, "because some of them are in Shanghai and we are out of touch now with Shanghai" (R. 289).

THE MOVANT BANK.

On January 26, 1950, a group of attorneys, Robert W. Kenny, of Los Angeles; Martin Popper and Wolf, Popper, Ross and Wolf, of New York City; Benjamin Dreyfus and Francis J. McTernan, Jr., of San Francisco, moved in the District Court for an order either dismissing the action or, in the alternative, for a substitution of attorneys in place and stead of those attorneys who had instituted the suit) upon the grounds that the individuals purporting to act on behalf of the Bank of China acted unlawfully and without authority; and that a hearing be directed on the issues of law and fact raised by the motion pursuant to Rule 43(e), Federal Rules of Civil Procedure (R. 75-77).[2]

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[2]The appellant does not here contest the procedure adopted by movant appellee. The question raised by the motion in the District Court was the authority of those who instituted the action on behalf of the Bank of China. It was the claim of the movant-appellee

In support of the motion, movant-appellee submitted the affidavits of Frederick V. Field, verified the 23rd day of January, 1950 (R. 77-79) and the affidavit of Martin Popper, verified the 25th day of January, 1950 (R. 80-94). Field averred that he was a citizen of the United States and President of the American-Chinese Export Corporation, a New York corporation; that the American-Chinese Export Corporation had for some time been actively engaged in trade and commerce with China, and was in the regular conduct of its business in frequent communication with leading commercial, industrial and banking institutions in China (R. 78). Field was first informed of the pendency of the action on December 19, 1949, and communicated this information to the Head Office, Bank of China two days later (R. 78).

On December 24, 1949, Field received a cablegram from Peking, China (R. 80) signed on behalf of the Head Office, Bank of China, by its General Manager and two Assistant Managers, appointing Field as attorney-in-fact to represent the interest of the Bank of China in the pending lawsuit (R. 78). All previous powers of attorney were revoked. The Assistant Man-

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that the action was unauthorized, legally "spurious", and that the only authorized agent of the Bank of China were the movant-appellee, who sought substitution or a dismissal of the action against Wells Fargo. The District Court had inherent power to inquire into the authority of those who initiated the action, and the procedure adopted to call this matter to the Court's attention was appropriate. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 47 S. Ct. 361; *King of Spain v. Oliver*, 2 Wash. C.C. 429, Fed. Cas. No. 7814; *National Lock Co. v. Thompson*, 86 F. (2d) 484 (C.C.A. 7th, 1936); *Alamo v. Del Rosano*, 98 F. (2d) 328 (App. D.C., 1938); *In re Retail Chemists Corporation*, 66 F. (2d) 605 (C.C.A. 2nd, 1933); *Sutherland v. International Ins. Co.*, 43 F. (2d) 969 (C.C.A. 2nd, 1930); *Friedman v. Harris*, 158 F. (2d) 187 (App. D.C. 1946).

ager who sent the cablegram was well known to Field (R. 79). Upon receipt of the cable and pursuant to his authority as attorney-in-fact, Field retained the law firm of Wolf, Popper, Ross & Wolf as counsel to represent the interest of the Bank of China (R. 78).

Martin Popper affirmed that he was an attorney at law and a member of the firm of Wolf, Popper, Ross and Wolf, attorneys of New York City (R. 80). In addition to the retention of the firm by Frederick Field, a separate communication was received by the law firm on December 24, 1949, authorizing the firm to act as lawyers for the Bank of China in the case against Wells Fargo Bank (R. 81, 89); the communication was signed by the General Manager and Assistant Manager of the Head Office. Pursuant to the authority vested in the law firm, associate counsel in San Francisco and Los Angeles were retained, and the aforesaid counsel were the only attorneys authorized to act for or to represent the Bank of China in any matters affecting the funds in the possession of Wells Fargo (R. 82).

The affidavit of Martin Popper further asserted that diligent investigation revealed that the action instituted on behalf of Bank of China had been without authority and against the expressed wishes of the management of said Bank of China (R. 82); that no justiciable case or controversy was therefore presented (R. 83); that a judgment rendered under such circumstances would be entirely void and without effect.

In support of the application for an order either dismissing the action or substituting the moving parties, and for a hearing, the following facts were set forth in the morning papers:

(1) On December 24, 1949, Frederick V. Field was appointed attorney-in-fact by the Head Office, Bank of China, and all previous powers of attorney were revoked (R. 84); (2) On December 24, 1949, Field retained the law firm of Wolf, Ross, Popper and Wolf, and on the same day the law firm received a direct communication from the Head Office, Bank of China authorizing the firm to act as lawyers for the Bank in the action against Wells Fargo; (3) On January 11, 1950, counsel was informed by cable (R. 90) that two thirds of the stock of the Bank of China is owned by the new government of the People's Republic of China, private stockholders' interests have remained unaffected by any law or decree save for a small amount belonging to war criminals; under the Charter of 1944, Board of Directors consisted of 13 government-appointed directors and 12 elected by private stockholders; the present General Manager and Assistant General Manager had replaced officers who fled to Hongkong and had been dismissed; all other officers in charge of the various business departments of the Bank of China remained in their original posts and were unaffected by political changes in China; (4) On January 16, 1950, another communication from the Bank of China (R. 91) stated that Kung was replaced as Chairman of the Board of Directors in April, 1948, long before recent

political changes, and a circular letter of June 1, 1948, cancelled Kung's specimen signature. Under the by-laws of the Bank, neither Kung nor the head of the foreign department of the Bank of China had authority to bring a lawsuit in its name (R. 85); (5) On January 22, 1950, another communication (R. 92) was received stating that the 1935 charter under which Kung and the others purported to act was amended in material respects in 1944; that the 1944 Charter was still in force, and pursuant to the Charter the number of directors and proportions of stock ownership had been modified as set forth in previous cables; that at least two directors elected by the stockholders' meeting of April, 1948, were still acting in that capacity within China and others had left under duress and expressed a desire to return; that new government-appointed directors had been named and were acting as such (R. 85). Another cable dated January 30, 1950 (R. 93) stated that the East China Financial and Economic Affairs Administration temporarily exercised Board authority after the liberation of Shanghai. The East China Administration announced December 24, 1949, the convening of a new directors' meeting, "upon arrival Peking directors elected by private stockholders" (R. 94).

The affidavit of counsel further affirmed that "the question as presented here is not one of a claim advanced by or on behalf of a foreign government. No question of nationalization, confiscation or expropriation is involved here. The Bank of China is in existence. * * * The sole question relates to the authority

of the individuals who initiated this action, and the authority of the attorneys who acted for them" (R. 88). Counsel for the movant averred that the action on behalf of the Bank of China was wholly unauthorized and unlawful, and that the Court had before it an action upon which no judgment could lawfully be based (R. 88).

THE OPINION OF THE DISTRICT COURT.

The decision of the District Court (R. 96-106) was rendered on July 17, 1950 (R. 106). The Court recognized that the facts which had been presented by Wells Fargo and the movant-appellee were virtually uncontroverted (R. 96-100). It pointed out that "the attorneys for the emigre directors countered these allegations of fact with the assertion that the Nationalist Government now operating from Formosa is the only government of China recognized by the United States" (R. 100). The District Court found, however, that the Bank of China "is not a public corporation nor are its funds government funds" (R. 102). The corporation is engaged in a general banking business. It operates through 200 branches throughout China. "The Bank of China cannot perform its functions while divorced from the Chinese nation. Its depositors, its 5,000 private stockholders, and the Chinese people—who may be characterized as the ultimate owners of the government stockholdings—must live under the government which in fact governs throughout the territorial limits of China" (R. 103). On the other hand, the District Court

found that the emigre directors of the Bank were scattered, the whereabouts of some unknown; some of them represent a government which cannot speak for the Chinese people in respect to the manner in which the corporation shall function in China; and others may not be the directors whom the private stockholders now desire to speak for them (R. 103).

Citing numerous precedents (R. 102), the District Court recognized the well-established judicial principle that the existence of a de facto government in control of its territory and nationals cannot be ignored; that a corporation existing in fact in a territory controlled by a de facto government was entitled to be managed and represented by agents of its own choosing; that if such corporation revoked the authority of prior agents or dismissed previous officers, there was no power in a court of law to disregard those uncontroverted facts, and to enter judgment against an American national on the basis of a patently unauthorized demand of lawsuit (R. 101-102).

The District Court recognized that the argument of the emigre directors that they were entitled to the funds because the government in Formosa was the only recognized government of China was clearly wrong. "For these are corporate funds which should not be dissipated for purposes other than those of the corporation" (R. 103). On the other hand, the District Court believed that if the Bank of China were to receive its funds on deposit with Wells Fargo, "the 'People's Government' would be aided and abetted" (R. 105).

Accordingly, movant-appellee's motion for dismissal or substitution was denied without prejudice (R. 106); appellant's motion for summary judgment was also denied (R. 106); trial of the cause was continued without date certain and Wells Fargo given leave to deposit the funds in the registry of the Court (R. 105-106).

THE ORDER OF THE DISTRICT COURT.

The aforesaid recital of facts would appear to make clear, it is respectfully submitted, contrary to the suggestion of the appellant here, that the decision of the District Court to continue the trial of the cause was far more beneficial to the appellant than to any of the other parties. Apart from the legal issue raised by appellant concerning the effect of recognition or non-recognition upon the lawsuit (its sole reliance to sustain the action), *the facts* demonstrated that there is only one Bank of China in existence today; that the bank is a private corporation; that movant-appellee are its only authorized agents; that the demand and action against Wells Fargo were wholly unauthorized; and that if the cause proceeded to full hearing, the application of the movant-appellee would, on the facts, be required to be granted by the District Court. The movant-appellee has not appealed from the order of the District Court because it believes that the order is not appealable; that, as the movant-appellee informed the District Court, its sole desire is to protect the stockholders and depositors of the Bank of China. The Bank has made no

demand upon Wells Fargo for the funds and does not question that Wells Fargo is a sound repository; the sole aim of movant-appellee is to preserve the funds for the corporation and to prevent their dissipation by those to whom the funds do not belong through the misuse of the law.

The order of the District Court (R. 106-110) did no more than preserve the status quo. The trial of the cause is continued without date, but there is no restraint upon any of the parties, upon good cause shown, to bring the cause on for trial. The only American national involved in the proceeding is Wells Fargo, the stakeholder. The District Court appears to have determined that Wells Fargo should not be penalized in any manner because of the dispute between the two groups who claim to represent the Bank of China. It has directed Wells Fargo to deposit the funds in the Registry of the Court, and relieved it of any further liability. The loss of any further interest must be borne by the alien corporation. The funds themselves are secure. In the meantime, all of the parties must abide the events "before the judicial function may be properly exercised" (R. 105). It is respectfully submitted that all of this presents nothing upon which the appellant can predicate legal injury.

SUMMARY OF ARGUMENT.

The Bank of China is a private corporation which has existed in China for almost 40 years and which still functions and has functioned uninterruptedly

for that period on the Chinese mainland as a commercial banking institution. Its stockholders are some 5,000 private individuals and the Chinese Government. The dispute herein grows out of a change in the Government of China and is one between two groups of Chinese nationals in which each group asserts authority to act for the corporation.

The change in the actual Chinese Government is a matter of fact which was established in the Court below. The political question of whether the Government of the United States has recognized that change diplomatically has no bearing on the issue of authority to act for this corporation.

The showing made by movant, Bank of China, established, and it was in fact conceded, in the District Court that the Central Peoples Republic of China is the actually existing—the de facto—government of China. It was also established conclusively that the authority of that group of Chinese nationals who caused the institution of this action had long been repudiated and revoked (if indeed it ever existed to the degree asserted by appellant) by the governing officials of the Bank of China.

Appellant ignores the only issue before the Court and ignores the uncontrovertible facts established in the District Court by movant. The parties before this Court are not governments, recognized or unrecognized. The issue before the Court is not one between governments or purported governments. The issue is a judicial one and not a political one. And upon the judicially established principles of international law

the Court must recognize the claim of movant, Bank of China, based as it is upon the acts and transactions of a private corporation existing under the de facto government of China.

Upon these principles, movant, Bank of China, was entitled to the relief it sought below. However, the decision below was not a final one nor an appealable interlocutory one. This Court therefore has no jurisdiction in the cause and the purported appeal should be dismissed. In the alternative, since the decision below merely preserved the status quo, it should be affirmed.

I.

THIS COURT HAS NO JURISDICTION OF THE PURPORTED APPEAL.

After the filing of the notices of appeal and the certification of the record to this Court, movant-appellee moved to dismiss these appeals upon the ground that this Court is without jurisdiction. On October 17, 1950, the Court denied said motions "without prejudice to their renewal upon the hearing of the causes on the merits." Movant-appellee hereby renews said motions.

Appellant asserts that this Court has jurisdiction of the purported appeals herein by virtue of 28 U. S. C. §1291, §1292 and §1294 (1), upon the theory that the orders of the Court below amount to final decisions and injunctions (App. Br. p. 3).

In no sense are the orders made by Judge Goodman final (28 U.S.C. §1291) and in no sense can they be considered the grant of an injunction (28 U.S.C. §1292).[3]

The orders,[4] which are substantially identical, provide as follows:

1. The trial of cause was continued *sine die.*

2. The motion for summary judgment was denied without prejudice.[5]

3. The motion to dismiss or in the alternative to substitute attorneys was denied without prejudice.

4. The defendant, Wells Fargo Bank & Union Trust Co., was permitted to (and did) deposit the funds involved in the Registry of the Court, pending a decision on the merits.

5. Upon deposit of the funds in the Registry of the Court, said defendant was relieved of all demands for interest for use of the funds.

6. Upon deposit of the funds in the Registry of the Court, the said defendant was discharged from all liability for the funds and the plaintiff, anyone claiming through the plaintiff, and all persons before the Court were restrained from attempting to enforce any claim against said defendant.

7. Said defendant's right to assert a claim for attorneys' fees against the fund was reserved.

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[3]28 U.S.C. §1294(1) merely designated the proper Court of Appeal to which an appeal lies from the District Court.

[4]R. No. 12698, p. 106; R. No. 12699, p. 26. The Orders will henceforth be referred to in the singular.

[5]No motion for summary judgment was made in No. 12699.

8. All counsel who had appeared in the proceedings were to receive notice of all subsequent proceedings.

A. THE ORDER IS NOT A FINAL DECISION.

The appellate jurisdiction of this Court can be invoked under 28 U.S.C. §1291 only where there has been a final decision of the District Court. The problem is the degree of finality required to bring appellate jurisdiction into being.

It is clear from the cases that in order to be final for purposes of appeal, the decision must be final in nature and complete as to all the parties and the whole subject matter of the action, must dispose of the entire controversy between the parties, terminate the litigation on its merits, and be a complete disposition of the cause, *Collins v. Miller,* 252 U.S. 364, 64 L. Ed. 616 (1920), *Arnold v. United States,* 263 U.S. 427, 68 L. Ed. 371 (1923), *Hunt v. United States,* 53 Fed. (2d) 333 (10th Cir., 1931), *Western Contracting Corporation v. National Surety Co.,* 163 Fed. (2d) 456 (4th Cir., 1947), *Asher v. Ruppa,* 173 Fed. (2d) 10 (7th Cir., 1949), *Balboa Shipping Co. v. Standard Fruit & Steamship Co.,* 181 Fed. (2d) 109 (2nd Cir., 1950), and so long as the matter remains "open, unfinished or inconclusive there may be no intrusion by appeal." *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 93 L. Ed. 1528, 1536 (1949).

Upon these well-established standards, the order herein cannot muster that degree of finality which is essential to the jurisdiction of the Court.

1. There was no determination of the controversy by the Court below.

Taken as a whole, the order of the Court below did nothing more than postpone decision on the conflicting claims of appellant and movant. The Court studiously avoided making any decision on the merits. Its sole concern was to protect the *res* so that its final decision, when made, would be meaningful. The whole tenor of the order demonstrates conclusively its lack of finality. Motions for summary judgment and to dismiss were denied without prejudice. The deposit of the funds in the Registry of the Court was *"subject to further order of the Court pending a decision on the merits."* (Emphasis added.) (R. No. 12,698, p. 108; R. No. 12,699, p. 28). The right to make later application for attorneys' fees was reserved to the defendant bank. Provision was made for notice to counsel of subsequent proceedings in the matter. The trial of the cause on the merits was continued for a later time. In other words, final decision was postponed and steps were taken to protect the jurisdiction of the Court in the interim. The rights of the conflicting claimants were not determined.

Appellant picks certain aspects of the order to which it appends the adjective "final" and thereby attempts to create a misleading impression of finality which, in fact, does not exist. For instance, it states that the appeals are from an order purporting finally to discharge appellant's claims against appellee (App. Br. p. 26). Appellant's statement is misleading in so far as it attempts to create the im-

pression that appellant's *claim to the funds* was finally denied. The Court below merely denied, without prejudice, appellant's motion for summary judgment. No order or judgment denying appellant's claim was made.

Again appellant claims error in the Court's "purporting finally to discharge Wells Fargo from all liability to the Bank of China" (App. Br. p. 8). True it is that Wells Fargo was relieved of liability, but it made no claim to the fund and took the position of a stakeholder. It was relieved of liability only after it deposited the sum claimed by appellant and movant in the Registry of the Court where it would be readily available to the successful claimant. Appellant's formal claim was against Wells Fargo, but its primary purpose in commencing the actions herein was not to fix a liability on Wells Fargo, but to obtain a sum of money which it claimed as its own. Wells Fargo has been discharged from liability, but appellant has not lost its claim to the fund. That claim has not yet been determined. The Court below has not finally acted on that matter which, actually, is the subject matter of the action.

In *Hunter v. Federal Life Ins. Co.,* 103 Fed. (2d) 192 (8th Cir., 1939), the Court entered a decree relieving the stakeholder of liability upon deposit of the funds in the Registry of the Court. The decree also distributed a portion of the funds, but retained the balance in the Registry of the Court subject to its further orders upon receiving proper proof of claims to the balance for which purpose it retained jurisdiction. The appellate Court held that it was

without jurisdiction, until the entire controversy had been determined. Similarly, the discharge of Wells Fargo's liability did not determine the controversy before the Court below. That controversy cannot be determined until ownership of the funds which had been in Wells Fargo's hands had been determined. Until that determination is made, there will be no final decision in this case.

2. The denial of interest is not a final decision.

On the matter of interest, appellant particularly stresses the alleged finality of the District Court's order. It is true that the order relieves Wells Fargo from the payment of interest for the use of the funds which are the subject matter of this action, upon the performance of certain conditions (which have been performed) by Wells Fargo. The only theory upon which the order denying interest could be held final and appealable is to place this case in the narrow exception to the general rule of finality, which permits appeal from adjudications, final in nature, of matters distinct from the general subject matter of the litigation (*Collins v. Miller, supra; Cohen v. Beneficial Industrial Loan Corp., supra*).

However, this provision of the order (Par. 5 of Order, R. 12,698, pp. 107-08; Par. 4 of Order, R. 12,699, p. 28) is but a step toward final judgment with which it will merge when a judgment is eventually entered after a final decision (See *Cohen v. Beneficial Industrial Loan Corp., supra*). It cannot be said that the claim for interest is a claim of right separable from, and collateral to, the basic claims

of right to the fund within the doctrine of *Cohen v. Beneficial Industrial Loan Corp., supra.* Nor is the claim for interest so independent of the cause itself and so important that appellate jurisdiction cannot and should not be deferred as was the order appealed from in the *Cohen* case.

Appellant's claim for interest is merely an incident of its claim for the funds previously deposited with Wells Fargo (see cases cited App. Br. p. 11). It can have no right to interest until it is finally determined that it is entitled to the funds. Its claim for interest, therefore, cannot be independent or distinct from the general subject matter of the litigation in these cases. A denial of that claim cannot make this order, otherwise interlocutory, final and appealable.

3. The other provisions of the order are not final.

Other provisions of the order are clearly interlocutory and the authorities denying appealability are legion.

(a) The denial of summary judgment without prejudice.

The order in No. 12,698 denied without prejudice appellant's motion for summary judgment. Orders denying motion for summary judgment have never been held final for purposes of appeal. *Marcus Breier Sons, Inc. v. Marvlo Fabrics, Inc.,* 173 Fed. (2d) 29 (2nd Cir., 1949), *Jones v. St. Paul Fire & Marine Ins. Co.,* 108 Fed. (2d) 123 (5th Cir., 1939), *In re Finkelstein,* 102 Fed. (2d) 688 (2nd Cir., 1939).

(b) The denial of the motion to dismiss or to substitute attorneys.

The order denied, without prejudice, movant-appellee's motion to dismiss the action or in the alternative to substitute attorneys. Orders denying motions to dismiss and motions for substitution of attorneys have never been held final for purposes of appeal. *McCullough v. Kammerer Corp.,* 156 Fed. (2d) 343, 345 (9th Cir., 1946), *Western Fruit Growers, Inc. v. United States,* 124 Fed. (2d) 381, 385 (9th Cir., 1941), *Toomey v. Toomey,* 149 Fed. (2d) 19 (App. D.C., 1945), *Ballard v. Mutual Life Ins. Co.,* 109 Fed. (2d) 388 (5th Cir., 1940), *Croissant v. Adams,* 27 Fed. (2d) 48 (7th Cir., 1928) (denial of motion to remove or dismiss attorneys).

(c) The continuance of the trial.

The order continued the trial of the cause *sine die.* Orders continuing or staying trials have never been considered final or appealable. *Bedgisoff v. Cushman,* 12 Fed. (2d) 667 (9th Cir., 1926), *Beckhardt v. National Power & Light Co.,* 164 Fed. (2d) 199 (2nd Cir., 1947), *Cover v. Schwartz,* 112 Fed. (2d) 566 (2nd Cir., 1940), *Mottolese v. Preston,* 172 Fed. (2d) 308 (2nd Cir., 1949). (These cases all involved an indefinite continuance or stay of the trial.)

(d) The deposit of the subject matter of the action in the Registry of the Court.

The order authorized Wells Fargo to deposit the funds, which are subject matter of the action, into the Registry of the Court. It has long been held that orders requiring deposit of funds which are the sub-

ject matter of an action are not final for purposes of appeal. *Louisiana National Bank v. Whitney,* 121 U.S. 284, 30 L. Ed. 961 (1887), *Norris Safe & Lock Co. v. Manganese Steel Safe Co.,* 150 Fed. 577 (9th Cir., 1907).

Upon all the authorities, therefore, the order from which appellant attempts to perfect this appeal does not achieve that degree of finality requisite to this Court's jurisdiction. It was neither complete as to all the parties, or as to the whole subject matter of the action nor did it dispose of the entire controversy and terminate the litigation on its merits.

B. THE ORDER DOES NOT GRANT AN INJUNCTION.

Appellant asserts that the orders of the Court below amount to injunctions and that this Court has jurisdiction of the purported appeal under 28 U.S.C. §1292 (App. Br. p. 3). There are two provisions of the order which conceivably could be considered injunctions:

1. That provision of the order continuing the trial;

2. That provision of the order restraining the plaintiff, those claiming through it and all persons before the Court from enforcing any claim against Wells Fargo.

However, neither of these provisions is an injunction under the well-established principles of appellate jurisdiction.

1. The continuance of the trial was not the exercise of the equitable powers of the Court.

In some circumstances, the grant of a stay of the trial of an action at law has been considered an order granting an injunction and therefore appealable even though interlocutory, However, this rule comes into effect only when equitable relief is sought by way of affirmative defense or cross-bill. *Enelow v. N. Y. Life Ins. Co.,* 293 U.S. 379, 79 L. Ed. 440 (1935), *Shanferoke v. Westchester Service Corp.,* 293 U.S. 449, 79 L. Ed. 583 (1935), *Ettleson v. Metropolitan Life Ins. Co.,* 317 U.S. 188, 87 L. Ed. 176 (1942). In each of these cases an action had been commenced at law and the defendant interposed an equitable defense or cross-bill. In each case also an order granting or denying a stay of the action at law was made by the trial Court. And in each case the order was based upon the equitable defense or cross-bill. The Supreme Court held, in each instance, that the grant or denial of the stay was the act of a court of equity granting or denying an injunction against proceedings in a court of law. It was held immaterial that the proceedings at law and in equity were pending in the same court in view of the established distinction between proceedings in equity and proceedings at law. Nor do the Federal Rules of Civil Procedure, establishing but one form of action in the Federal Courts, change the rule, for the distinction between law and equity persists, at least for this purpose *(Ettleson v. Metropolitan Life Ins. Co., supra).*

In the present case, however, no equitable relief was sought in the District Court nor any granted.

The action was one at law; the answer raised no equitable defenses; nor was an equitable cross-bill filed by the defendant. The motion for summary judgment was intended to obtain a judgment at law, and movant's motion to dismiss or for substitution of attorneys was obviously addressed to the law side of the Court. The Court, in failing to act finally upon the issues raised by the various pleadings and motions, was acting in its capacity as a court of law and by virtue of its inherent power to control the progress of the cause before it. *Morgantown v. Royal Insurance Co.,* 337 U.S., 254, 93 L. Ed. 1347 (1949), *Beckhardt v. National Power & Light, supra.* See, also, *Enlow v. New York Life Ins. Co., supra,* 293 U.S., at pp. 381-2, 79 L. Ed., at p. 442. The order continuing the trial was therefore not a grant of an injunction, but an interlocutory order made in the progress of a legal action and therefore not appealable.

2. The order restraining plaintiff from enforcing its claim against Wells Fargo is not an appealable order.

It is clear from the foregoing discussion of the order, from which this appeal is attempted, that the provisions thereof which appear to restrain plaintiff from enforcing its claim against appellee Wells Fargo Bank & Union Trust Co. are purely interlocutory and if appealable at all can be appealed only upon the ground that they constitute a grant of an injunction. Careful analysis of the order and law will show conclusively that no injunction has been granted by this order.

It has already been demonstrated that the action out of which this order arose was an action at law—an action *ex contractu* to recover a demand deposit (see App. Br. p. 11).

The pleadings raised no equitable issues and no equitable powers of the Court were invoked. The Court was acting as a court of law and not as a chancellor. In these circumstances, the order which says that the plaintiff is "restrained" from proceeding and enforcing the claim can only mean that all action on the claim was stayed. The order, in this respect, was merely supplemental to the order continuing the trial and, similar to the order continuing the trial of the cause, was the order of a court of law exercising its inherent power to control the progress of the cause before it. *Morgantown v. Royal Insurance Co., supra; Beckhardt v. National Power & Light, supra.* See, also, *Enelow v. New York Life Ins. Co., supra.*

Moreover, it is equally clear that unless the court is acting in a suit in equity, its order cannot operate as an injunction. This proposition became settled law in *Schoenamsgruber v. Hamburg American Lines,* 294 U.S. 454, 79 L. Ed. 989 (1935). In that case the action was in admiralty upon a libel claiming damages for personal injuries. The respondent applied for arbitration which the Court ordered and at the same time stayed the trial of action pending the arbitration. The libellant appealed and this Court dismissed the appeal. *Certiorari* was granted and pending the decision by the Supreme Court, the *Shanferoke* case, *supra,* was decided. In that case the

Court held that a special defense setting up an arbitration agreement in an action at law is an equitable defense or cross-bill (that is, a suit in equity) and that a stay of the trial granted upon such a defense is the grant of an injunction, within the doctrine of the *Enclow* case, *supra*. Therefore, an appeal would lie from such order. However, in the *Schoenamsgruber* case the Court held that, since the admiralty court had no general equitable powers, the defense setting up the arbitration agreement could not be a suit in equity. The action staying the trial was therefore not an injunction but nothing more than an order postponing the trial of an action at law. As such it was not an appealable order.

There was no suit in equity in the Court below, in this case, either by reason of the allegations of the complaint, the answer, or the various motions made. The Court's action in "restraining" plaintiff from proceeding was not therefore the grant of an injunction by a court of equity but merely an interlocutory order of a court of law controlling the progress of the litigation before it. Such an order is not appealable.

Finally, there is ample authority that this order, even if considered an injunction is, nevertheless, not appealable. In *Bennell Realty Co. v. E. G. Skinner & Co., Inc.,* 74 Fed. (2d) 491 (7th Cir., 1935), it was held that an interlocutory injunction enjoining the termination of a lease and fixing a temporary rental pending the determination on the merits was not appealable. The Court said:

> "We think that this statute contemplates an injunction or restraining order which actually infringes some right on the part of appellant and the continuation of which pending the final determination of the action will materially affect its interests". (74 Fed. (2d) at p. 494.)

and that:

> "* * * no appeal would lie in a case in which the injunction order was nominal or in which the decree would be equally effective without it * * *" (74 Fed. (2d) at p. 494.)

The order in this case is nominal, too, for the continuance granted by other provisions of the order and the pendency of the original action itself would prevent appellant from attempting any other proceeding to enforce its claim.

CONCLUSION.

Appellant's real complaint is that the Court below failed to reach a final determination of the adverse claims to this fund. Until such a determination is made, this Court has no jurisdiction over an appeal. The purported appeal, therefore, must be dismissed.

II.

THE SOLE ISSUE BEFORE THE DISTRICT COURT WAS THE AUTHORITY OF APPELLANT OR MOVANT-APPELLEE TO REPRESENT THE BANK OF CHINA, A PRIVATE CORPORATION, IN THE ACTION AGAINST WELLS FARGO. THIS WAS A JUDICIAL QUESTION TO BE DECIDED ON THE FACTS AND APPLICABLE LEGAL PRINCIPLES. THE ISSUE DID NOT INVOLVE THE POLITICAL QUESTIONS OF RECOGNITION OR NON-RECOGNITION.

A. INTRODUCTION.

The District Court had before it three important considerations which flowed from the facts adduced by the parties. The record established the following in broad outline:

1. The Bank of China, a private corporation organized in 1912 and "which has weathered previous governmental upheavals" (R. 102), continues to exist and operate in China under the People's Republic. It has not been nationalized nor dissolved, nor have its assets been confiscated or expropriated. Most of its private shareholders retain their equity. All of its branches, its business departments, its banking functions continue uninterrupted. It functions through its board of directors which continues to exist, although its meetings were temporarily suspended because some of its personnel had been dispersed. In accordance with its Charter, a majority of the stock of the corporation is owned and in the possession of the Government of the People's Republic; the balance of the stock is in the hands of private persons in China, held "by five thousand different individuals" (R. 165).

2. The individuals who instigated this lawsuit represent no one but themselves (R. 235-244). They seek

to obtain possession and control of funds now on deposit by the Bank of China with an American national. If these funds are turned over to the aforesaid individuals, the funds will be lost forever to its rightful claimants: the depositors, creditors and stockholders of the Bank of China. Should these individuals succeed in obtaining the funds, they will be accountable to no one. In addition, if the demand and institution of the present suit is unauthorized, Wells Fargo will suffer double liability.

3. The People's Republic of China has replaced the so-called Nationalist Government, and the latter has not for almost two years exercised any governmental or proprietary functions on the territorial mainland of China. The United States Government is cognizant of these facts and has no disposition to ignore them. Its failure to accord recognition "de jure" to the People's Republic is not based on the ground that it does not exist, nor exercise control and authority in the territory of China, but on other considerations.

The District Court was bound to exercise a judicial function, to pass upon a controversy between two groups of foreign nationals each contending that they were the true agents of an alien corporation. If the Bank of China is a private corporation organized and doing business on the mainland of China; if there is an existent board of directors duly elected by private and governmental stockholders; if the management of the corporation has revoked all prior powers of attorney and appointed new agents; if the Bank has made no demand on its American depository for any

of its funds and has not authorized the institution of any suit to obtain such funds—those are facts which no court of law can ignore. "Irrespective of recognition or non-recognition, the courts may take cognizance of any fact pertinent to the protection of private and public rights, including the acknowledgment of the existence of a new state or government." Brown, P.M., The Legal Effects of Recognition, 44 American Journal of International Law 617-640, 639 (October, 1950).

The basic fallacy which permeated appellant's argument below and still persists here is the view that an unrecognized government is a party to this action. Such position is contrary to the facts and law, not only as shown by movant, but as shown by appellant itself on the record. The suit herein was instituted by the appellant in the name of the Bank of China. In its pleadings, and by its witnesses, the appellant has constantly maintained that the Bank of China is a separate entity, independent of the Government, even though not privately owned. The Supreme Court of the United States by unanimous decision in *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 51 S. Ct. 229 (1931) held that a corporation, a juridical entity that could not exist were it not for the acts of the unrecognized government, may be a party litigant (the decision is discussed hereafter in detail). In *Amtorg Trading Corporation v. United States,* 71 F. (2d) 524 (Ct. of Cust. & Pat. App., 1934), the Court stated (pp. 528, 529):

> "When a government becomes a stockholder in a corporation, it does not exercise its sovereignty

as such. 'It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.' (Citations.) Nor does the fact that the government may own all or a majority of the capital stock take from the corporation its character as such, or make the government the real party in interest." (Citations.)

B. APPLICABLE LEGAL PRINCIPLES.

It is now firmly established that international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. *Kansas v. Colorado,* 206 U.S. 46, 77, 27 S. Ct. 655 (1907). In accordance therewith, courts of law will always take cognizance of the domestic acts and transactions of private individuals and corporate personalities in states where *de facto* governments exist. The rule is grounded on the essential continuity in the life of the state, irrespective of changes of governments or of alterations in the normal administration of civil affairs and justice. This principle is today the law of the land. It is embodied in solemn treaty between the United States and other states. Convention Between the United States of America and Other American Republics on Rights and Duties of States, 49 Stat. 3097.

"The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and property, and conse-

quently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law."[6] (*Supra,* p. 3100.)

Since the inception of the Republic, the United States Supreme Court has uniformly held that the principle of continuity in the external relations of the state imposes logically the acceptance of another fundamental principle, namely, the validity of acts and transactions which take place under a *de facto* government. *United States v. Rice,* 4 Wheat. (U.S.) 246, 4 Law. Ed. 562 (1819); *Thorington v. Smith,* 8 Wall. (U.S.) 1, 19 L. Ed. 361 (1869); *Texas v. White,* 7 Wall. (U.S.) 700, 19 L. Ed. 227; *United States v. Home Insurance Co.,* 89 U.S. 99, 22 L. Ed. 816 (1875); *Underhill v. Hernandez,* 168 U.S. 250, 18 S. Ct. 83 (1897); *Baldy v. Hunter,* 171 U.S. 388, 18 S. Ct. 890 (1898); *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 51 S. Ct. 229 (1931).

The aforesaid decisions emphasize that "recognition" is a political decision made by the executive arm of the government. It is often dependent on factors far removed from the question as to whether a government in fact exists in a given territory, to which the people give obedience, and which is capable of enforcing its laws. Courts of law in this country, on

[6] In terms of the rules of law governing the effect of recognition and nonrecognition, the concepts of "State" and "Government" are and have been used interchangeably. *Texas v. White,* 7 Wall. (U.S.) 700, 702; *Lauterpacht,* Recognition in International Law (1947), p. 87.

the other hand, are created to adjudicate private controversies. In making their determinations, they cannot ignore the facts which govern the controversy. They cannot ignore the existence of a people in a territory ruled by a government, nor can they ignore the fact that transactions which occur on such territory are governed by the rules of law adopted in such territory and affecting the inhabitants therein. These are facts upon which judicial determinations must be made. These are matters peculiarly within the province of the judicial arm of government. Constitutional deference by one arm of government to another is a reciprocal obligation—each is supreme in its own forum. The absence of recognition by the executive arm of government does not negative the existence of a state, nor the consequences which flow from the existence of such state and government.

Thus, for example, in *Thorington v. Smith, supra,* the Supreme Court had before it the problem as to whether a contract for the payment of Confederate notes, made during the Civil War, between parties residing within the Confederate States, was enforcible on the Courts of the United States. Clearly, there had been no political recognition of the Confederate States by the Federal Government against which the States were in open rebellion.

> "It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States,

was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent * * * It was by the central authority thus organized and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territories of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government." (p. 7.)

Describing governments such as the Confederate States as governments *de facto* or governments of paramount force whose existence the Courts cannot ignore, the Supreme Court then addressed itself to the question of the legality of the transactions which take place in territories controlled by such governments.

"It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it is circulated, and from the necessity of an obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States * * * They are transactions on the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced

in courts of the United States, after the restoration of peace, to the extent of their just obligations." (pp. 11-12.)

In *United States v. Home Insurance Company, supra,* the legislatures of the insurgent states were held empowered to create corporations, such as insurance, banking and trust companies, which corporations successfully prosecuted suits for the recovery of their funds paid into the treasury of the United States. In *Underhill v. Hernandez, supra,* the Supreme Court affirmed that "every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves" (p. 252). The Supreme Court added significantly, "Nor can the principle be confined to lawful or recognized governments or to cases where redress can manifestly be had through public channels" (p. 252).

The decision in *Russian Volunteer Fleet v. United States, supra,* is of decisive importance here. In 1924, a petition was filed in the Court of Claims alleging that the Russian Volunteer Fleet was a "corporation duly organized under, and by virtue of the laws of Russia"; that in 1917 it had become the assignee for value of certain contracts for the construction of two vessels in America; that these contracts had been requisitioned by Executive Order and the vessels were constructed for the use of the United States; and

that the United States thereby became liable to the petitioner for the payment of just compensation. The Court of Claims dismissed the petition upon the ground that the United States Government had not recognized the Soviet Union, and that the corporation could not be considered "the citizen of any government" within the purview of Section 155 of the Judicial Code which governed suits by aliens against the United States. In the argument before the Supreme Court, a letter from the Secretary of State was submitted stating that "the Government of the United States had not extended recognition to any regime established in Russia subsequent to the overthrow of the Provisional Government". Writing for a unanimous Court, Chief Justice Hughes said:

> "Nor do we regard it as an admissible construction of the Act of June 15, 1917, to hold that the Congress intended that the right of an alien friend to recover just compensation should be defeated or postponed because of the lack of recognition by the Government of the United States of the regime in his country. A fortiori as the right to compensation for which the acts provided sprang into existence at the time of the taking, there is no ground for saying that the statute was not to apply, if at a later date and before compensation was actually made, there should be a revolution in the country of the owner and the ensuing regime should not be recognized. The question as presented here is not one of a claim advanced by or on behalf of a foreign government or regime, but is simply one of compensating an owner of property taken by the United States." (p. 492.)

The leading international law opinion on the issue here under consideration is the historic ruling of Chief Justice Taft, acting as sole arbitrator between Britain and Costa Rica, 18 American Journal of International Law 147. In his conclusions of law, he stated:

> "I must hold from the evidence that the Tinoco government was an actual sovereign government. But it is urged that many leading powers (including the United States) refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other powers is an important evidential factor in establishing proof of the existence of a government in the society of nations * * * nonrecognition * * * cannot outweigh the evidence * * * as to the *de facto* character of Tinoco's government, according to the standard set by international law."

It was in the light of these general principles that the District Court was bound, it is respectfully submitted, to consider the facts before it. Not only were the United States Supreme Court decisions decisive on the issue, but an entire body of decisions by the lower Federal and State Courts all pointed in the same direction. These cases, on the main, were the product of events which followed the Russian Revolution in 1917 and the failure of the Government of the United States to extend recognition to the Soviet Union until 1933. A number of decisions, not pertinent here, dealt with the effect of decrees of expropriation or naturalization on assets outside the Soviet Union. Because of the misunderstanding both of the

nature of recognition and of the legal effects resulting from recognition or from nonrecognition, these decisions of the lower Courts were often contradictory and confusing, leading in many cases to serious miscarriages of justice. Mr. Justice Frankfurter stated at a later date in reviewing these decisions that they were largely the "product of casuistry, confusion and indecision". *United States v. Pink,* 315 U.S., 203, 235. See also, Jaffe, L.L., Judicial Aspects of Foreign Relations, 1933; Brown, P.M., The Legal Effects of Recognition, 44 American Journal of International Law, 617-640 (October, 1950).

The Russian situation was, however, productive of decisions not involving extra-territorial confiscation. These decisions simply carried forward the basic principles which had been enunciated in the Supreme Court decisions: that a stable and effective *de facto* regime, albeit unrecognized, may not be ignored; that in relation to matters within its territorial jurisdiction, and particularly involving its own nationals such effect must be given to its domestic legislation as would be given to a regime wholly recognized *de jure.*

In *Wulfsohn v. Russian Socialist Federated Republic,* 234 N.Y. 372, 138 N.E. 24, writ dism. 266 U.S. 580 (1923), an action was instituted in 1922 against the Russian Government to litigate the title to certain property confiscated by that Government. In holding that the unrecognized government was immune from such suit, the Court of Appeals stated:

> "The result we reach depends upon more basic considerations than recognition or nonrecognition by the United States. Whether or not a government exists clothed with the power to enforce its

authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact not a theory. For its recognition does not create the state although it may be desirable. So only are diplomatic relations permitted. Treaties made with the government which it succeeds may again come into effect. It is a testimony of friendly intentions. Also in the country granting the recognition that act is conclusive as to the existence of the government recognized. (Citations.) Again recognition may become important where the actual existence of a government created by rebellion or otherwise becomes a political question affecting our neutrality laws, the recognition of the decrees of prize courts and similar questions. But except in such instances the fact of the existence of such a government wherever it becomes material may probably be proved on other ways." (p. 375.)

Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) was decided by the Court of Appeals shortly before recognition. The Soviet Government had nationalized some oil lands belonging to plaintiff and sold the oil to defendant. Plaintiff sued for an accounting. The complaint was dismissed. The Court of Appeals pointed out that complete inquiry by the trial Court had brought forth the acknowledgment from the State Department that it was "cognizant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact. The refusal of the Government of

the United States to accord recognition to the Soviet regime is not based on the ground that that regime does not exercise control and authority in territory of the former Russian Empire, but on other facts" (p. 224). The Court of Appeals then stated:

> "As a juristic conception, what is Soviet Russia? A band of robbers or a government? We all know that it is a government. The State Department knows it, the courts, the nations and the man on the street. If it is a government in fact, its decrees have force within its borders and over its nationals * * * The courts may not recognize the Soviet government as the *de jure* government until the State Department gives the word. They may, however, say that it is a government, maintaining internal peace and order, providing for national defense and the general welfare, carrying on relations with our government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve." (p. 226.)

After disavowing any prior expressions in its opinions which may have given rise to a different inference, the Court of Appeals concluded (p. 228):

> "Nonrecognition is no answer to defendant's contention, no reason for regarding as of no legal effect the laws of an unrecognized government ruling by force, as the Soviet government in Russia concededly was."

In *Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202 (S.D.N.Y. 1929), the Bank of France sought to recover gold in the Trust Company's possession which it alleged had been illegally confiscated

by the State Bank of the Soviet Union. The Court stated:

> "This court should not assume that the Union of Soviet Socialist Republics acquired title to the gold in question by confiscation or in any manner inconsistent with our accepted standards. If there are any circumstances under which the Soviet Government might acquire title to property which would be recognized then these defendants, American nationals, should be allowed an opportunity to show the circumstances relating to their source of title (p. 205) * * * the refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such state." (pp. 205-206.)

See also, *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.,* 28 F. Supp. 279 (S.D.N.Y. 1939).

In *The Denny,* 127 F. (2d) 404 (C.C.A. 3rd, 1942), the facts were as follows: In 1940, one Litamcor purchased on behalf of two associations organized under the laws of Lithuania, a ship, the S.S. DENNY, and a cargo of gasoline and oil. The vessel remained in the United States in Litamcor's possession. In 1941, a libel on the vessel and cargo was filed by one Recht, purporting to act as attorney-in-fact for the Lithuanian associations. Thereafter Litamcor was appointed trustee of the vessel by the Consul General of the Republic of Lithuania, and Litamcor filed an answer to the libel as such Trustee. Before the matter came on for trial, Recht, acting now as attorney-in-fact for the State Steamship Line, a corporation of the Soviet Socialist Republic of Latvia, obtained

leave for that corporation to intervene as libelant. The District Court dismissed the libel and the intervening libel. In reversing the decrees, the Court of Appeals held in language most pertinent here:

> "Finally it is argued that since the government of the Lithuanian Socialist Republic and its admission to the Union of Soviet Socialistic Republics have not been recognized by our government, this Court may not, by permitting Recht to act under the powers of attorney given to him, recognize or give effect to the decrees of the Soviet Socialist Republic which reorganized Lietukis and nationalized Baltic Lloyd. But these are both Lithuanian associations and the parties in interest, so far as here appears, are all citizens of Lithuania and domiciled therein. The rights of American citizens as residents are not involved. We may not ignore the fact that the Soviet Socialist government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein. It follows that the respondents may not question in this court the validity of the Lithuanian decrees in so far as concerns their effect upon the interests of the former members of the associations therein or the validity of the powers of attorney executed by the association's officers and offered in this proceeding." (p. 410.)

The significance of this uniform body of authorities could not be avoided by the District Court. It was clear to the Court that the Bank of China continues to exist as a private corporation. The governing offi-

cials of the corporation within the territory under whose sovereignty alone it can continue to exist are duly acting under its pre-existing charter. The withholding of recognition cannot impair the right of a corporation of an unrecognized state to act to protect its property. *Russian Volunteer Fleet v. United States, supra.* The fact that recognition *de jure* may be elsewhere does not confer on nationals of the unrecognized states, in litigation here, the right to ignore changes in corporate status or authority that have occurred within its territory and in conformity with its laws. *The Denny, supra.* Courts will not give fictions the effect of reality and deny here the natural consequences of the force which the decrees of a government in fact has within its borders and over its nationals. *Salimoff v. Standard Oil Co., supra.* Except as to the reception of diplomatic representatives, questions affecting our neutrality laws, recognition of the decrees of prize Courts, and similar questions, the fact of the existence of a *de facto* government wherever it becomes material may be proved in other ways than action of the political department. *Wulfsohn v. Russian Socialist Federated Republic, supra.* These were the principles of law which the District Court was required to apply to the facts in controversy.

C. THE FACTS BEFORE THE DISTRICT COURT REQUIRED THE APPLICATION OF THE AFORESAID GENERAL LEGAL PRINCIPLES.

1. The issue before the District Court was in essence a narrow one. One group of Chinese nationals asserted that it had authority to act for the Bank of

China. Another group of Chinese nationals asserted that authority was vested in them. The question to be decided was: who were the true agents of the Bank of China.

2. The Bank of China is an institution with over two hundred branches, throughout the territorial mainland of China, and over twenty agencies abroad (R. 273). There is no evidence that the Bank ever had a branch on Formosa. The Bank conducts a general commercial business, including: granting of commercial credits; discount or purchase of commercial bills and drafts; handling all kinds of deposits; acceptance of securities for safekeeping; collection of commercial paper for companies, other local banks, and individual clients; granting of loans against reliable securities (Articles of Association, XI, R. 306; By-Laws, XVIII, R. 203). The funds affected by the present suit are "definitely not" public funds of the government deposited abroad; they are "private" deposits, the product of the "commercial" operations of the bank (R. 283).

The Bank has participated in as much as 42.2% of loans to farmers made throughout China and has had 28% of the total of savings deposits in the four largest banks (Chinese Year Book, 1943, pp. 438-9). Its income account in 1947 shows interest of 438,032,414 thousands of Chinese dollars and commissions of 51,-934,155 thousands (Moody's Banks, Insurance, Real Estate Investment Trusts, 1949, p. 893). Its 1947 balance sheet shows *inter alia* the following figures, also in thousands of Chinese dollars (*id*):

Due from banks	11,965,539,719
Demand loans	1,822,634,878
Time loans	231,288,644
Securities & Investments	7,815,247,525

Its liabilities—which the real management in Peking have neither been shown to have repudiated nor failed to discharge, include, among others (*id*):

Due to Banks	9,325,779,397
Demand Deposits	5,080,268,846
Rediscounts & Cldrs.	186,111,650
Remittances, etc.	590,467,262
Accounts Payable, etc.	3,060,332,105

It has previously been noted that the private shareholders of the Bank number approximately five thousand, dispersed throughout the mainland of China (R. 165, 170). Only Chinese nationals are eligible to own shares of stock of the Bank (By-Laws, VI, R. 200).

3. The District Court was faced with the fact that the individuals who instigated the lawsuit were without standing, entirely apart from the repudiation of their conduct expressed in the cables from the Bank of China referred to in the Statement of Facts herein. The question of the relationship of the Bank of China to individuals removed from office long before the recent political changes (R. 85), who represented to the District Court that they were acting under a 1935 charter (R. 14) when substantial amendments had been made in 1944 (R. 92) raised grave doubts relative to the validity of appellant's claim and lawsuit. In the ultimate sense, the Court's jurisdiction was involved if the suit pending before it was legally spurious.

The action was instituted by appellant solely on the basis of a power of attorney dated December, 1946, purportedly given by the Bank of China to one Tuh-Yueh Lee, who described himself as "manager of the New York agency of the Bank of China" (R. 245), which position he took over in 1946. No matter how broadly drafted, a power of attorney intended to furnish authority to manage a local branch of a corporation is not usually construed to permit its holder to seize assets held for the bank's head office. See *Andre v. Beha,* 211 App. Div. 380, 208 N.Y. Supp. 65, aff'd 240 N.Y. 605, 148 N.E. 724 (1925). If the power of attorney were limited to the management of the New York Agency, its general language might appropriately be held limited to its specific area coverage. However, to construe the power of attorney as vesting power in an employee of a corporation to exercise the authority of a Board of Directors throughout a country, permitting him without limitation to collect the funds of that corporation wherever they may be found "without inquiry as to the circumstances of issue or the disposition of the proceeds" (Power of Attorney, Par. 5, R. 40); to authorize an employee to lend money without security (Power of Attorney, Par. 9, R. 43) contrary to the express provisions of the Articles of Association (XII, R. 307) and By-Laws (XIX, R. 204) raised serious doubts concerning Lee's authority.

Moreover, and most significantly, Lee did not construe his power of attorney as authorizing him to draw out any funds from Wells-Fargo unless instructed to do so (R. 266). This was confirmed by Hsi Te-Mou (R. 242). But Lee had never consulted the

management of the Bank of China before instituting the suit. He had "talked" with only two individuals, Mr. Hsi and Dr. Kung (R. 262). In the case of Dr. Kung, he had not even been connected with the Bank since April 30, 1948 (R. 85), long before recent political changes took place.

Moreover, the record showed that Lee made no effort to ascertain whether his claimed authority still continued. Clearly, he had the legal duty in the light of events which occurred in China after 1946 to ascertain whether his authority continued. Lee knew that the vice president of the Wells-Fargo Bank had been notified on four different occasions by the Bank of China in Shanghai not to make any payments to anyone except on order from the bank at Shanghai (R. 130-147). Lee knew that the bank had appointed new officers, cancelled signatures and taken every step to make clear that any authority under which Lee might claim had been revoked (R. 261). Lee knew that the head office of the bank was by the Articles of Association located in Shanghai (III, R. 304). Yet others were claiming that the head office was in Canton (R. 270), in Chungking (R. 36), and even in Hongkong (R. 270). Knowing all this, and without ascertaining the wishes or actions of the Board of Directors of the Bank of China, or its lawful officials, Lee instituted suit demanding payment of a large sum of money—all of this solely on the basis of a power of attorney given him in 1946. See Restatement of Agency, Sections 33, 115. This entire action had been instituted by appellant, as the District Court could plainly discern, solely on the instigation of Kung and

Hsi Te-Mou in New York. Kung had no authority, Hsi Te-Mou knew there could be no "directors" meeting since a quorum was not available (R. 236). He did not have possession of the books, records and accounts of the Bank (R. 243). He knew that the last shareholders' meeting had taken place in 1948 (R. 237). He knew, of course, of all the changes that had taken place in the management of the bank since 1948 (R. 239). The fact was that even on appellant's own showing, its complaint in the District Court was subject to dismissal.

4. There was no doubt, as we have shown, that the Bank of China was an existent private corporation operating in the territory of China. Had the stock of the Bank of China been held entirely by private stockholders, there is also little doubt that their selection of a new Board of Directors and management, despite a change in government, would have been binding on the courts of this country; and their selection of new agents and determination as to the disposition of the funds in Wells-Fargo would have been conclusive here. It is submitted that the situation was not changed because a portion of the stock, pursuant to the bank's charter, was held by the government.

The only question left for the District Court was whether or not a government existed in the territory of China capable of holding the stock and acting as a stockholder along with the private stockholders in the selection of a new management pursuant to the charter and by-laws of the bank. On this issue, appellant hardly was in a position to deny the existence of such a government. In fact it was conceded (R. 349). Its

sole reliance was on the fact that political recognition has not been extended to the government. But that issue was not before the District Court. The Court's concern was whether *in fact* a government existed on the mainland of China, in effective control and supported by the Chinese people, capable of holding stock in a private corporation. As to whether such a government existed, the short answer was: "The State Department knows it, the courts, the nations and the man on the street." *Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 226, 186 N.E. 679, 682 (1933).

It is a matter of common knowledge that the Central People's Government of the People's Republic of China exists in fact. It has been recognized by at least the following countries: Great Britain, India, Denmark, Switzerland, Israel, Ceylon, Pakistan, Burma, Norway, Poland, Rumania, Hungary, Bulgaria, Yugoslavia, Czechoslovakia and the Soviet Union. Notes accompanying this recognition as in the cases of Great Britain and India were usually premised on the basis of the effective control by the People's Government of the territory of China, support by the mass of the Chinese people to the new regime; and the agreement by the new Government that it would abide by its international obligations. The San Francisco Chronicle of December 31, 1949, stated editorially that "the United States is up against the fact that the Communist regime is clearly a de facto regime". On December 30, 1949, the New York Times foreign editor reported: "The Communist regime at Peiping, now in control of the whole of the Chinese mainland, will probably be recognized by India this

week and by the British before January 10." On December 11, 1949, the San Francisco Chronicle, reporting on a conference of the World Affairs Council, quoted Roger D. Lapham, former Mayor of San Francisco and recently head of the Economic Co-operation Administration's China Aid Mission as saying, "It cannot be denied that the Communists have de facto control of all China". The Secretary of State stated, "And now it is abundantly clear that we must face the situation as it exists in fact" (Department of State Publications 3573, Far Eastern Series 30, p. XVI). On January 15, 1950, the New York Times reported that the State Department had "instructed Mr. Clubb (American Consul General in Peiping) to make known to Chou En-Lai, Foreign Minister of the Communist Government that certain buildings in the city were the property of the United States". A number of such "formal notes" were sent to the Foreign Minister, the New York Times reported. The entire American press reported on or about October 1, 1949, that the People's Republic of China, with a new government and new constitution had been established; legislative, executive and judicial departments created; and officials were duly filling offices of state. On November 28, 1950, at the invitation of the United Nations, a representative of the Central People's Government of the People's Republic of China attended and addressed a meeting of the United Nations Security Council at Lake Success, New York.

5. The facts before the District Court were, therefore, wholly in favor of movant's position. It was clear that the stockholders of the Bank of China, gov-

ernmental and private, had selected a new board of directors and management; that it had revoked all previous powers of attorney; that it had selected new agents to represent the Bank (see Statement of Facts herein); that both the Bank and its true representatives had made no demand upon Wells-Fargo nor authorized the institution of the suit; that those who instituted the suit were strangers to the Bank and wholly without power to act in its name. Had the motion been heard and determined on its merits, both the facts and the overwhelming weight of authoritative decisions would have required the District Court to either dismiss the complaint or permit a substitution of counsel.

Instead, the District Court continued the trial of the cause *sine die,* leaving the "funds where they are for the present" (R. 105), and maintaining "the status quo" (R. 105). The movant-appellee submits that in the light of the aforesaid analysis of the law and facts, the postponement of the trial herein affected its rights far more adversely than those of appellant. The position taken here by appellant appears to rest on an almost complete disregard of the facts before the District Court and an untenable view of the applicable law. The subsequent discussion in this brief is devoted to an examination of appellants' arguments and an analysis of their validity.

III.

THE APPELLANT'S DISCUSSION OF THE LAW AND FACTS IGNORES THE RECORD AND THE ISSUE BEFORE THE DISTRICT COURT. THE RIGHT TO REPRESENT THE BANK OF CHINA IN THE ACTION AGAINST WELLS FARGO WAS A JUDICIAL AND NOT A POLITICAL QUESTION.

The appellant's argument is that it is entitled to judgment as a matter of law (App. Br. pp. 26-28). It asks this Appellate Court at this stage of the proceedings to enter or direct the entry of judgment in a sum over $800,000 without any further judicial consideration of the facts (App. Br. p. 28). The appellant, which constitutes one group of Chinese nationals, requests this Court to disregard the rights of the sole American national involved. Wells-Fargo, and the other group of Chinese nationals whose proof that they represent the Bank of China is complete and factually uncontroverted (App. Br. p. 12). Even if the demand and action initiated by Messrs. Lee, Kung and Hsi should prove to be wholly without authority; even if those who claim to be directors of the Bank could not get together a quorum (R. 237); even if the appellant has not presented the slightest evidence to prove that the Board of Directors or any authorized official countenanced this attempt to gain control over the funds of the Bank of China—even so, appellant assures this Court (App. Br. p. 12), Wells-Fargo is in no jeopardy and the Bank of China and its true agents will never be able to demand another sum of $800,000 from this American bank. It is submitted that there is nothing in appellant's brief to justify this gratuitous conclusion.

A. THE APPELLANT OVERLOOKS THE ISSUE BEFORE THE DISTRICT COURT.

The appellant states in its brief (p. 13): "The Bank of China, the owner of the Wells-Fargo deposits, is in full operation and entitled to the return of its funds." The appellant concedes therefore, as it must, in the light of the testimony of its own witnesses, that this is not a suit by or against any foreign government. The District Court had no such issue before it. All that was pending before the District Court was a simple action brought by a private corporation to recover a deposit. Raised by appropriate motion was a challenge to the authority of those persons who authorized the action to act for and in the name of Bank of China. Who was the true agent of the Bank of China? That question had to be answered by the District Court for two reasons: (1) If the demand on Wells Fargo was unauthorized, the suit which had been instituted was spurious; (2) If the claim and suit were unauthorized, Wells Fargo, the only American national involved, was being subjected to the possibility of a loss of $800,000 through no fault of its own.

The District Court had before it sufficient testimony by affidavits and depositions to warrant the conclusion that a judicial hearing would have to be held to determine the question of agency, not only for the protection of the defendant Wells Fargo but as a vindication of the Court's own authority to entertain the action at all. The appellant's attempt to show its authority had foundered on its own testimony. It had

presented nothing other than some private action by three individuals in the United States. (Compare, By-Laws, Articles III, VI, XXIII-XXX, XXXII-XXXIV, XXXV-XXXVI, XLIV; R. 198-223). The showing made by movant, as to its authority to represent the Bank of China, was more than prima facie; it was complete and in no way denied. All that the District Court decided was that a full hearing upon this issue of authority to represent the Bank of China should be postponed (R. 95-106).

The appellant treats this appeal as if it were upon a full record and judgment after trial. That is not the case at all. The issue before the District Court and on this appeal is not whether "the Communists" have a "claim to the San Francisco bank deposits of appellant" (App. Br. p. 13); it is not whether "an unrecognized foreign government" can "acquire a claim to assets in the United States" (App. Br. p. 14); It is not whether "the Communists" have a "claim to the Government stock in the Bank of China" (App. Br. 21); it is not whether "the Communists" can "be heard" to assert a claim to appellant's deposits with Wells Fargo (App. Br. p. 24). The sole question is whether the order of the District Court postponing the hearing on the issue as to who is authorized to represent the Bank of China in the suit against Wells Fargo is appealable, and if appealable, whether the order should be affirmed as an exercise of sound judicial discretion or remanded to the District Court for full hearing.

B. THE APPELLANT OVERLOOKS THE FACTS IN THE RECORD.

The appellant's brief completely disregards the facts as they were presented to the District Court, not only by the movant but by the appellant itself. The appellant states in its "Introduction" (p. 1) that it is now "conducting its banking operations from its head office in Formosa." There is no evidence in the record of a head office in Formosa nor the conduct of any banking operations there. There is no evidence that the Articles of Association (III, R. 304) or the By-Laws (III, R. 198) were ever lawfully amended to change the head office from Shanghai. All that we have in the record is that the individuals on Formosa did not even concern themselves with the institution of the present suit (R. 264-265) nor was a quorum available there of those who claimed to be directors (R. 237).

The "Introduction" of appellant's brief states (p. 1) that Wells Fargo refused to pay because "representatives of the Communist People's Government of China—claimed that they had become legal representatives of the Bank of China." It is stated further that "attorneys for the Communists" (p. 2) appeared in the District Court and moved to dismiss the action on the ground "that the appellant Bank of China operating from Formosa, was not entitled to maintain them" (p. 2). There is not the slightest evidence in the record to support these assertions. The movant affirmed and was ready to establish that in accordance with the By-Laws and Articles of Association of the Bank of China, duly authorized meetings of the shareholders of the Bank of China existing and operating in

the territory of China had duly elected a Board of Directors and management, who had in turn appointed movant as representative of the Bank of China in the United States with instructions to appear in the action against Wells Fargo for the protection of the Bank (R. 75-94). It is therefore incorrect for the appellant to state that the District Court "held in effect that, since the Bank of China had lost certain of its assets in China by seizure and conquest, it was also to be deprived of its San Francisco assets." (p. 2). The District Court really held in effect as its opinion clearly shows (R. 96-106) that movant had made a strong showing as to its right to represent the Bank (R. 99-100); that appellant's showing (R. 103) was untenable and that this question of fact concerning the true agent of the Bank of China should be left for a later determination (R. 105).

In its "Statement of the Case" (App. Br. pp. 3-8), appellant constantly treats the Bank of China as some "creature" of the so-called "National Government of the Republic of China." It states that with respect to the Bank, the National Government "had full power to direct its destiny" (App. Br. p. 5). This is, of course, in conflict with first principles of the law of corporations as known to our jurisprudence, and contradicted by appellant's own showing as to the history of the Bank of China. The juridical personality endowed on a corporation is a product of an act of sovereignty—emanating not from any particular government, but from the state. The rights of a sovereign state are vested in *it,* rather than any particular government which may purport to represent it. *Guaranty*

Trust Co. v. United States, 304 U.S. 126, 137. Corporations acquire authority from the sovereign power of the state. 18 C.J.S. 404. Indeed, a familiar example of their survival of a transfer of sovereignty is found in the fact that corporations, created in the "American Colonies" by English Kings, still exist in the United States. 18 C.J.S. 367. In the deposition of Hsi Te-Mou (R. 187) it is admitted that the Bank of China was organized in 1912, and has existed continuously since that time. As the District Court noted, the Bank of China "has weathered previous government upheavals" (R. 102).

In its efforts to avoid the actual issue involved on this appeal, the appellant enmeshes itself in a welter of contradictory statements and distortions of the facts in the record. It speaks of the bank as having both public and private functions (p. 4), but it overlooks the testimony of Hsi Te-Mou, its own witness,— "The Bank of China is a commercial bank and its deposits with Wells Fargo are private deposits" (R. 284). It admits that the purported directors are all scattered (p. 4) including a group of seven, the "managing directors" of the bank, the so-called executive committee. It omits to state that five of the persons claimed to be "managing directors" now are and for sometime have been in the United States (R. 239, 277); this despite the requirement of the by-laws (XXXII) that the managing directors "shall regularly be present at the Bank to attend to their respective duties" (R. 208). It overlooks that its own witnesses were uncertain as to what was going on in Taiwan (Formosa) (R. 279); that few records were there (R. 283); and there seems to be considerable

doubt as to the nature and extent of communications between Formosa and New York (R. 228-229, 243, 272). Mr. Hsi himself—the "general manager" required by the by-laws (XXVIII) to "manage the affairs of the whole bank" (R. 207)—has been in the United States since June or July, 1949 (R. 282). The books and records which he originally claimed to be under his control (R. 35) were subsequently admitted to be such only "by courtesy" (R. 243).

The appellant states that the bank "moved" from Shanghai to Canton, from Canton to Chungking and finally from Chungking to Formosa (App. Br. p. 5). There is a significant omission in the record concerning the action of the general shareholders in this regard (By-Laws, XLIV, XLV, R. 215) or the Board of Directors (By-Laws, XXXVI, R. 211). At another point (App. Br. p. 6), the appellant refers to the head office, foreign department located in Hongkong from which instructions emanated, although this does not appear to accord with appellant's prior description of the "movement" of the Bank of China.[7] More-

[7]In its efforts to persuade the District Court that the Bank of China had "moved" and to wave out of existence the Bank in territorial China with its two hundred branches throughout the mainland, its stockholders, creditors and depositors, the appellant offered a "certificate" (R. 298-299) by an official to establish that such movement had lawfully occurred. The certificate was entirely worthless on the issue of whether or not the Bank of China had *in fact* moved. *Von Zedtwitz v. Sutherland*, 26 F. (2d) 525, 526 (App. D.C. 1928); *People v. Galnel*, 57 Cal. App. (2d) 788, 135 P. (2d) 378 (1943); *Matter of Asterio*, 172 Misc. 1081, 1084, 16 N.Y.S. (2d) 943 (1939); *Matter of Johnson*, 172 Misc. 1075, 1077, 16 N.Y.S. (2d) 855 (1939). Nor could the "certificate" prove the "lawfulness" of the removal. An official may prove the text of a law; but foreign law must always be determined as a question of fact. The Articles of Association (XXIV, R. 310) provide that as to matters not specifically set forth therein, the "company Laws" of China apply. These laws could only be determined as questions of fact, and as to these no

over, although it constantly injects the notion that the plaintiff in the action which appellant instituted is the "National Government," it finally concedes that the funds in Wells Fargo "belonged in each case to the single corporate entity, 'Bank of China' " (App. Br. p. 5).

C. THE APPELLANT OVERLOOKS THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND THE ENTIRE BODY OF OTHER LEGAL PRECEDENTS WHICH UNIFORMLY SUPPORT MOVANT'S POSITION. THE FACTS AND DECISIONS CITED BY APPELLANT HAVE NO RELEVANCE ON THIS APPEAL.

1. While the appellant has relegated the decisions of the United States Supreme Court and other decisions cited by the District Court to the footnotes of its brief (App. Br. pp. 14-15), it is submitted that their pertinency to the issue here is in no way lessened. Throughout its brief, the appellant seeks to deprive the movant of even the right to a hearing at which it can prove its claims by the constant reiteration that "an unrecognized foreign government cannot acquire a claim to assets in the United States" (App. Br. p. 14). On the assumption that the movant is an unrecognized foreign government, it then constructs an argument which has not the slightest bearing on the issues. The movant indicated from the outset that it was ready to submit to the District Court the question whether it represented an unrecognized foreign government or the bona fide management of the Bank of China, its depositors, business clients and stockholders. This much is certain: the party plaintiff here, whom appellant purports to represent, is out of its own testimony the Bank of China, a private corporation. If, as the appellant states, "the Bank is a

vigorous existing institution" (p. 14) then the issue before the District Court is not whether a suit or claim to assets can be made by an unrecognized foreign government, but whether the Bank of China is represented by movant or by the three emigres in New York having no contact with, and no responsibility to the flesh and blood reality that makes any bank a going concern.

The only individuals interested in immediately seizing the funds now in Wells Fargo are Messrs. Lee, Kung and Hsi Te-Mou.

Under such circumstances, the legal issue is not whether an unrecognized government can sue in the courts of the United States, but whether the acts and transactions which occur in a territory governed by a de facto regime can be disregarded by the courts of law whenever private claims are advanced. On this issue, it has been demonstrated by the decided cases that such facts cannot be ignored whenever they become material, and are always legally provable.

To distinguish the numerous decisions cited by the District Court, the appellant states (p. 14, note 4) that they dealt only with "the effect to be given by United States courts to transactions involving persons or property physically subject to the de facto control of the unrecognized government and later appearing in this country." Such a statement, which is not even correct factually, is clearly not evidence of any distinction. On the contrary, the appellant implicitly concedes away its entire thesis for it is compelled to admit that the Supreme Court and other American courts have constantly upheld claims based on acts

extended to the particular government then effectively in control. It concedes that the courts have recognized claims even when the assets appear in this country. In other words, appellant itself admits that in a factual situation as is presented on this appeal the courts have always treated the matter as a judicial question and not a question of political recognition by an executive arm of government.

To distinguish the decisive decision of *Russian Volunteer Fleet v. U. S.*, 282 U.S. 481, 51 S. Ct. 229 (1931), the appellant can only state (App. Br. p. 14, note 4 (2)) that that case involved the "effect of non-recognition upon claims asserted against the United States". There is not a single word in the Court's opinion to indicate that the Supreme Court's decision rested on any such tenuous basis. The real basis of the *Russian Volunteer Fleet* decision was that an alien corporation in existence and in operation under an unrecognized government (and despite the formal suggestion of the Secretary of State that the United States recognized another government) was entitled to recover assets belonging to it in the United States.

To distinguish the decision in *Wulfsohn v. R. S. F. S. R.*, 234 N.Y. 372, 138 N.E. 24 (1923) writ dismissed 266 U.S. 580, 45 S. Ct. 89 (1924), appellant states that that case only upheld the sovereign immunity of an unrecognized government (App. Br. p. 14, note 4 (3)). That case did more than decide the single question of immunity. It held that the existence in fact of a government is not dependent upon recognition; its existence may "be proved in other ways" (p. 375).

This Court will observe that appellant's main reliance is upon a decision of the New York Court of Appeals, *Petrogadsky etc. v. National City Bank,* 253 N.Y. 23, 170 N.E. 479 (1930), certiorari denied 282 U.S. 878 (App. Br. p. 15, *et seq.*). The paucity of decisions which appellant can marshal in its support is a measure of the validity of its position. Before discussing these decisions, it may be well to broadly examine the historical evolution of the principles herein involved.

As we have previously demonstrated, the Supreme Court from the inception of the Republic has enunciated the fundamental principle of international law that the continuity of the existence of a state requires the courts to consider the existence of a government and the acts and transactions which occur therein whenever such facts must be determined in a judicial inquiry, even if such government is unrecognized by the political arm of government. As to recognition, the Supreme Court has stated:

> "(The political department's) action in recognizing a foreign government and in recessing its diplomatic representatives is conclusive on all domestic courts which are bound to accept that determination, *although they are free to draw for themselves its legal consequences in litigations pending before them.*" *Guaranty Trust Co. v. United States,* 304 U.S. 126, 138; 58 S. Ct. 785, 791 (1938). (Emphasis supplied.)

Before the recognition of the Soviet Union in 1933, the problem arose as to whether its decrees nationalizing the banks and insurance companies which had

been in existence since the czarist regime, and confiscating their assets, were binding upon courts in the United States. Upon this question, the courts in New York (there were at least twenty-five decisions of which appellant has extracted one) were in much contradiction. Refusing at first to respect the acts of the new Russian government, the courts of New York finally began to hold that "to refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve." (*Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933)). Finally, when the Soviet Union was recognized and the decision of the Supreme Court was rendered in *United States v. Pink,* 315 U.S. 203, 62 S. Ct. 552 (1942), the basic principles of law which had been promulgated from the beginning were reaffirmed. The *Pink* case involved the validity of an Executive Agreement (Litvinov assignment) which was contemporaneous with recognition of the Soviet Union. In this agreement, many of the claims of the nationalized corporations in Russia were assigned to the United States. The agreement was held binding on the courts in all forty-eight states and no local public policy could contravene it. Thus, in effect, the Supreme Court upheld the validity of the decrees of the Soviet Union which had gone into effect before recognition and impliedly overruled previous decisions of state courts which had held to the contrary. One of these decisions was the *Petrogradsky* case upon which the appellant relies so heavily. In a note in 139 American Law Reports 1209, it is stated:

> "The decisions in the Belmont and Pink cases would also seem to overrule, or at least to throw strong doubt on, the other decisions of the New York courts refusing under various circumstances, to give any extraterritorial effect to the Soviet nationalization decrees. Such decisions, now of doubtful authority, are *Vladikavkazky Ry. Co. v. New York Trust Co.*, * * * decided upon the authority of Petrogradsky * * *" (p. 1219).

It is clear that appellant's main reliance upon the *Petrogradsky* case is misplaced. Moreover, the appeal here does not involve the nationalization of a bank or the expropriation of its assets. Nor is this a suit in the name of an unrecognized foreign government. There is not involved here the capacity of a foreign government to sue in an American court. There is only the question of whether the movant or appellant is the true agent of the only plaintiff in the action, the Bank of China, a private corporation. In *Russian Reinsurance Co. v. Stoddard,* 240 N.Y. 149, 147 N.E. 703, the Court stated:

> "Its rule may be without lawful foundation, but lawful or unlawful, its existence is a fact and that cannot be destroyed by juridical concepts. The State Department determines whether it will recognize its existence as lawful, and until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our

> government will have no dealings. That does not concern our foreign relations. It is not a political question, but a judicial question." (p. 158).

Even in cases where foreign corporations long dissolved were held to still continue as juristic personalities, the courts of New York always warned against any sweeping conclusions drawn from such decisions. Thus, in *James & Co. v. Second Russian Ins. Co.,* 239 N.Y. 248, 146 N.E. 369 (1925), the Court stated: "We do not say that a government unrecognized by ours will always be viewed as non-existent by our courts" (p. 256). In *Sokoloff v. National City Bank,* 239 N.Y. 158, 145 N.E. 917 (1924), the same Court reiterated: "* * * effect may at times be due to the ordinances of foreign government which, though formally unrecognized, have notoriously an existence as governments de facto" (p. 165). And in *Severnoe Securities Corp. v. L. & L. Ins. Co.,* 255 N.Y. 120, 174 N.E. 299 (1931), reargument denied 255 N.Y. 631, the Court of Appeals after distinguishing the *Petrogradsky* case as limited to its facts, held that surviving directors of one of the Russian nationalized corporations were without authority to act in its behalf." The Northern Insurance Company of Moscow dismembered by the decrees of the Russian Soviet Republic, retains a pallid life as the shade or little more of its former self" (p. 122).

The only other New York cases which the appellant can find its support are some lower court decisions like *Amstelbank, N. V. v. Guaranty Trust Co.,* 177 Misc. 548, 31 N.Y.S. (2d) 194 (1941) and related decisions (App. Br. p. 17). These decisions do not

aid the appellant. Indeed, they militate against its position. Those cases were decided on the basis of a procedural statute in New York, New York Civil Practice Act, Section 51-a. That section enabled a stakeholder to obtain an order permitting it to give notice of pendency of an action to any alleged adverse claimant to funds sought in a complaint. Interpreting the word "claim" strictly under the statute, the lower New York courts held that when "a question of agency" arose between two parties, that did not mean they were "adverse claimants" under Section 51-a of the Civil Practice Act.

What the appellant overlooks is that since the enactment of Section 287-g of the New York Civil Practice Act in 1948, the New York Legislature has expressly done away with the rule laid down in the *Amstelbank* and *Kownklyke* cases. This intention was noted by the Executive Secretary of the New York Judicial Council, who pointed out:

> "Chapter 850 amended Section 51-a repealing sec. 4 and substituting new subdivisions 4 and 5. The two subdivisions extend the application of section 51-a to cases where two or more persons are acting for the same claimant and would change the holding of *Amstelbank, N. V. v. Guaranty Trust Co. of N. Y.* (177 Misc. 548, 31 N.Y.S. (2d) 194 (Sup. Ct. N.Y. Co., 1941) when it was held that the assertion of sole authority to act for a plaintiff was not a 'claim' under section 51-(a) but merely a question of authority" 20 New York State Bar Association Bulletin 216.

2. The appellant states that the decision in *The Denny,* 127 F. (2d) 404 (C.C.A. 3rd, 1942) "cannot

be accepted" (App. Br. p. 19) as authority in the light of the later decision by the same court in *The Maret,* 145 F. (2d) 431 (C.C.A. 3rd, 1944). Unfortunately for appellant, that is precisely what the Third Circuit did not hold. The Maret was a ship of Estonian registry which, while at the Virgin Islands was requisitioned by the United States Maritime Commission. The claimants to the funds were diverse foreign creditors, American creditors, various individuals and domestic and foreign corporations. At two points in its opinion (pp. 438 and 442), the Court pointed out, *after trial and a complete record,* that the unrecognized government was the real party claimant. The Court of Appeals stated (p. 439):

> "The question presented by the facts of the case at bar, however, are different in essential respects from those which were before the courts in such cases as *M. Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345; *Boncode Espana v. Federal Reserve Bank,* 114 F. 2d 438, 441-445, and The Denny, 127 F. 2d 404, decided by this court."

The Maret and related cases cited by appellant did not hold that the absence of recognition precludes a court from determining the rights of foreign nationals in accordance with the laws of the country which governs them. It held that an unrecognized government itself had no standing to make a claim against a ship to which diverse claims by foreign and domestic creditors had been made. To construe the case as holding that every alien corporation or individual citizen of an unrecognized government is without legal redress in the courts of this country,

regardless of the facts, is to disregard the Circuit Court's own distinctions and the overwhelming weight of authority. As Judge Goodrich stated in his concurring opinion (p. 444):

> "When our government recognizes the government of a foreign country that recognition can be on such terms and conditions as are mutually agreed upon. These terms and conditions are binding because, representing action by the federal government in its constitutional field, they are the supreme law of the land. I find difficulty in seeing a parallel in the case of non-recognition which seems to me simply absence of recognition. But in the absence of recognition of the foreign government, it seems not improper, in a litigated matter, to deny effect to an act of that government which purports to change the ownership of a chattel many hundreds of miles away from its borders. Therefore I think the result reached is the correct one."

The entire argument of Appellant (pp. 24-26) that the "Communists cannot be heard to assert a claim to appellant's deposits with Wells Fargo" rests on a fallacious basis. It is true that *no* foreign government comes to an American court as suitor, as a matter of right; its power to sue flows from the "comity" of nations, conferrable only by the Executive Department. Where the court has *found from the record before it* that an unrecognized government was the real party in interest, it has rejected the claim of a nominal plaintiff. In the instant case, however, the District Court had before it the positive proof from both appellant and movant that the real party in interest was the Bank of China and that there had been

no transfer of title or succession in interest. The appellant's convenient assumption that "movant" is the "People's Government" is unfounded. These are matters of fact, not to be disposed of by a statement of a brief.

3. Actually, as appears from appellant's argument on pp. 21-23 of its brief, its only attack is on the authority of the movant to represent the Bank of China. Its view is that even if the People's Republic of China is *in fact* a stockholder in the Bank of China under the Articles of Association and By-Laws of the Bank of China, its action together with the private stockholders in electing a new Board of Directors, and the Board's appointment of a new management, is all without validity because the People's Government is not recognized. Apparently, the appellant is of the view that the government of a state cannot become the possessor of stock in a private corporation unless its predecessor has made some formal assignment of the stock. The fact is, however, that "the courts of our country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez,* 168 U.S. 250, 252, 118 S.Ct. 83 (1897). If in fact, the People's Republic is a stockholder in the Bank of China (whether it is a revolutionary government or not) under the laws of China, then its action together with the private stockholders cannot be ignored. This is a question of fact which bears upon the primary issue of agency and that question still remains to be decided. "The official acts, laws, and decisions with rare exceptions, such as treaty rights, are to be deemed

valid," Brown, P.M., The Legal Effects of Recognition, 44 American Journal of International Law, 617-640, 639 (October 1950).

4. A final word may be stated concerning appellant's assurance that "a subsequent recognition of the Communists, even if it took place" could in no way "affect the validity of the prior payment to appellant" (App. Br. p. 12) citing *Guaranty Trust Co. v. United States,* 304 U.S. 126, 58 S.Ct. 785 (1938). However, there was a subsequent decision in *United States v. Guaranty Trust Co.* (reported sub nom Steingut v. Guaranty Trust Co.) 161 F. (2d) 571 (CCA 2nd, 1947). Involved in the second *Guaranty* case was not an account of the old government itself, but a deposit account in the name of the Nationalized Russo-Asiatic Bank. Before recognition, the refugee directors of Russo-Asiatic, meeting in Paris, had demanded repayment to themselves. Their action was still pending at recognition. As to the effect of their actions with respect to the account, the Circuit Court said unanimously (p. 573):

> "As the deposits were debts payable on demand, nothing was due and payable until a demand. We agree with the trial judge that the demand of the refugee directors of the Russo-Asiatic Bank was not effective. Accordingly, no effective demand was made until the United States instituted the present actions."

If, as the appellant desires, the movant is excluded from the action without a hearing as to its authority to represent the Bank of China, and the demand of Kung, Lee and Hsi are subsequently found to have

been ineffective, there is no way in which Wells Fargo can avoid a subsequent suit by the Bank of China, or its assignees.

CONCLUSION.

It is respectfully submitted that the appeals from the orders of the District Court should be dismissed, or in the alternative, the said orders should be affirmed.

Dated, San Francisco, California,
March 30, 1951.

Respectfully submitted,
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